IN THE

Supreme Court of the United States

October Term, 1976
No. 76-1616

COUNTY OF LOS ANGELES, a political subdivision of the State of California; KENNETH F. FARE, Acting Chief Probation Officer; HARRY L. HUFFORD, Acting Director of Personnel; and JACKIE HASENSTAB, Personnel Officer,

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal From the United States District Court for the Central District of California.

MOTION TO AFFIRM JUDGMENT.

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SUBJECT INDEX

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

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Appellees move, pursuant to Rule 16 of the Rules of this Court, for affirmance of the Partial Judgment of the United States District Court for the Central District of California, entered on February 23, 1977. That Judgment declared California Government Code § 1031 (a), which requires peace officers in California to be United States citizens, violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and declared the actions of Appellants, in denying Appellees employment as peace officers

solely because they are lawful resident aliens, violative of 42 U.S.C. §§ 1981 and 1983. This motion is made on the grounds that the District Court's Opinion and Judgment conform, in all respects, to prior decisions of this Court and, therefore, Appellants' Jurisdictional Statement does not present any issues which are worthy of plenary consideration by this Court.

Introduction.

California Government Code § 1031(a)[1] requires that persons employed in peace officer positions with the State of California or local governmental entities be United States citizens. The mandate of § 1031(a) is implemented by California Penal Code §§ 830[2] *et seq.*, which list the positions defined as peace officers. Included within this category are deputy probation officers employed by local county governments. Pursuant to the mandate of § 1031(a) Appellees Jose Chavez-Salido, Ricardo Bohorquez, and Pedro Luis Ybarra (collectively hereinafter plaintiffs) were denied employment by Appellants County of Los Angeles, Kenneth F. Fare, Acting Chief Probation Officer; Harry L. Hufford, Acting Director of Personnel; and Jackie Hasenstad, Personnel Officer (collectively hereinafter "the County"), as deputy probation officers solely because of their alien status.

In the Court below, plaintiffs challenged the constitutionality of § 1031(a) and the actions of the County in denying them employment. Plaintiffs alleged that

[1]The full text of California Government Code § 1031 is reproduced in Appendix A.

[2]California Penal Code § 830 is reproduced in Appendix B. A list of peace officer positions is set forth in footnote 22 of the District Court's Opinion. Jurisdictional Statement, Appendix A, at 37-42.

§ 1031(a) violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and that the County's actions in enforcing § 1031(a) denied the rights guaranteed to them by 42 U.S.C. §§ 1981 and 1983. Plaintiffs sought 1) a declaratory judgment declaring § 1031(a), and the County's enforcement of § 1031(a), violative of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983; 2) injunctive relief enjoining the County from enforcing or applying § 1031(a) against plaintiffs; and 3) equitable relief in the form of appointment to deputy probation officer positions and back pay. Federal court jurisdiction was based on 28 U.S.C. §§ 1343(3) and 1331.

Pursuant to 28 U.S.C. §§ 2281-2284, a three-judge District Court was convened to hear and decide this case. A trial, on stipulated facts[3] was held on August 20, 1977. On February 3, 1977 the Three-Judge Court, per Irving Hill, D.J., handed down its Opinion, 427 F.Supp. 158 (C.D. Cal. 1977), which constituted its findings of fact and conclusions of law, granting plaintiffs the injunctive and declaratory relief they sought. On February 23, 1977 the District Court entered Partial Judgment to that effect.

Summary of Argument.

In this appeal the County first contends that the District Court erred in subjecting § 1031(a) to strict judicial scrutiny and that § 1031(a) is justified as a valid exercise of the State's power to define its

[3]In addition to a joint stipulation of facts, plaintiffs also submitted uncontested affidavits attesting to their willingness to subscribe to Los Angeles County's loyalty oath. The County offered no additional evidence by affidavits or otherwise.

"political community". Second, the County argues that municipalities are immune from suit under 42 U.S.C. § 1981 and that the provisions of § 1981 do not extend to aliens. Third, the County argues that plaintiffs' claims for relief against the County of Los Angeles under the Fourteenth Amendment and 28 U.S.C. § 1331(a) are without merit because no claim for relief exists directly under the Fourteenth Amendment, without separate statutory authorization for suit to enforce that Amendment.

Plaintiffs submit that the District Court Opinion and Judgment conform in all respects to prior decisions of this Court. First, the District Court, relying on this Court's decisions in *Sugarman v. Dougall*, 413 U.S. 634 (1973) and *In Re Griffiths*, 413 U.S. 717 (1973), properly subjected California Government Code § 1031(a) to strict judicial scrutiny. Even assuming that § 1031(a) serves a compelling state interest, the District Court was correct in determining that § 1031(a)'s discriminatory classification is constitutionally infirm because it is overly broad. Second, this Court has also recognized that the immunity from suit granted to political subdivisions under 42 U.S.C. § 1983 does not extend to actions based on 42 U.S.C. § 1981. *District of Columbia v. Carter*, 409 U.S. 418 (1973). Moreover, it is settled law that the provisions of 42 U.S.C. § 1981 extend to aliens and the right to secure gainful employment. *Takahashi v. Fish & Game Comm'n.*, 334 U.S. 430 (1948); *Graham v. Richardson*, 403 U.S. 365 (1971); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975).

Finally, this Court's decision in *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) clearly held that when federal court jurisdiction is based on

28 U.S.C. § 1331, a cause of action for damages and equitable relief may rest solely on the Constitution, independent of any specific statutory right of action. *See also City of Kenosha v. Bruno*, 412 U.S. 507 (1973).

Thus, plaintiffs submit that the County's Jurisdictional Statement does not present any substantial issue worthy of consideration by this Court. Therefore, plaintiffs urge this Court to summarily affirm the District Court's Partial Judgment.

ARGUMENT.

I

California Government Code § 1031(a)'s Blanket Exclusion of Aliens From Peace Officer Positions Does Not Constitute a Constitutionally Permissible Exercise of the State's Power to Define Its "Political Community."

It is settled law that statutory classifications which discriminate on the basis of alienage are subject to strict judicial scrutiny. *Graham v. Richardson, supra,* 403 U.S., at 376; *Sugarman v. Dougall, supra,* 413 U.S., at 642; *In Re Griffiths, supra,* 413 U.S., at 721; *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero,* 426 U.S. 572, 96 S. Ct. 2264, 2281 (1976). As this Court declared in *Graham v. Richardson:*

> ". . . [C]lassifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example 'of a discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." 403 U.S., at 372 (citations omitted).

A state which adopts a suspect classification bears a "heavy burden of justification", *In Re Griffiths, supra,* 412 U.S., at 721; the state must demonstrate "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Examining Board of Engineers, Architects and Surveyors v. Flores de Otero, supra,* 96 S. Ct., at 2281, quoting from *In Re Griffiths, supra,* 413 U.S., at 721-722. This Court has also held that when testing the constitutionality

of such a discriminatory classification, it will look "to the narrowness of the limits within which the discrimination is confined." *Sugarman, supra,* 413 U.S., at 645. In striking down California Government Code § 1031(a), these Constitutional principles were followed and correctly applied by the District Court. Jurisdictional Statement, Appendix A, at 16-24.

In this Court, the County argues that the District Court erred in subjecting § 1031(a) to strict judicial scrutiny. Relying on language from *Sugarman v. Dougall, supra,* the County argues that peace officers and probation officers hold important non-elective governmental positions and, therefore, the District Court should have utilized the less rigorous rational basis standard in testing the constitutionality of § 1031(a). Jurisdictional Statement, at 9. The County's argument is without merit.

Sugarman v. Dougall, supra, involved a challenge to a provision of the New York State Civil Service Law which required citizenship for appointment to any position in the state's classified civil service. In striking down that provision as violative of the Fourteenth Amendment, this Court stated:

> "We recognize a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community'. *Dunn v. Blumstein,* 405 U.S. 330, 334 (1972). We recognize, too, the State's broad power to define its political community. But in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." 413 U.S., at 642-643.

In attempting to define the limits of the state's "political community", this Court explained that:

> ". . . [T]his power and responsibility of the State applies, not only to the qualifications of voters, but also to persons holding state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government." 413 U.S., at 647.

In that limited context, this Court suggested that a less stringent standard of judicial review may be appropriate, when it is confronted with "matters resting firmly within a State's constitutional prerogatives." 413 U.S., at 648. The County erroneously argues that California's attempt to limit peace officer positions, including probation officers, to United States citizens falls within this limited category. Jurisdictional Statement, at 6-9.

The County's argument rests on the assumption that peace officers and probation officers are "so close to the core of the political process as to make . . . [them] . . . formulator[s] of governmental policy", *In Re Griffiths*, 413 U.S., at 729, and that the statutory discrimination is narrowly confined. Neither assumption is correct.

First, neither peace officers nor probation officers participate directly in the formulation, execution, or review of broad governmental policy. Rather, the duties, functions, and authority of a peace officer[4] are limited

[4]In California "peace officers" are not elected. Rather, the power of a "peace officer" is conferred on certain designated positions. Penal Code § 830; *see* Appendix B, *infra*.

by statute. Penal Code § 836.1. These duties are essentially ministerial in nature, consisting of the authority to make an arrest with or without a judicial warrant. Thus, peace officers have the responsibility to ensure that California's penal laws are enforced. It is not their function to participate in the formulation of such laws, or to judge the policy behind such laws; their duty is to ensure that the general citizenry obeys the law as written by the California Legislature. Under these circumstances, the District Court correctly subjected § 1031(a) to strict judicial scrutiny.

This same conclusion is also mandated when testing the constitutionality of § 1031(a), as applied to probation officers. The duties of a probation officer include among other responsibilities, the conduct of pre-sentence investigations and the preparation of recommendations as to sentence of criminal defendants,[5] supervision of adult and juvenile probationers,[6] investigation of probation violations[7] and the filing of criminal charges against juveniles.[8] And, as stated by the District Court:

> "Important as those duties are, we cannot characterize a deputy probation officer as an employee who participates 'directly in the formulation, execution or review of broad public policy. . . .'" Jurisdictional Statement, Appendix A, at 23, quoting from *Sugarman, supra*, at 649.[9]

[5]Penal Code § 1203.

[6]Penal Code § 1203.1; Welfare and Institutions Code § 236.

[7]Penal Code § 1203.2.

[8]Welfare and Institutions Code §§ 628, 630.

[9]The District Court's Opinion is in accord with *Taggart v. Mandel*, 391 F. Supp. 732 (D. Md. 1975) (three-judge court) where the exclusion of aliens from the office of notary public was struck down, and *Norwick v. Nyquist*, 417 F. Supp.

(This footnote is continued on next page)

Thus, since peace officers, including probation officers, are not makers of broad governmental policy, § 1031(a) must be subjected to strict judicial scrutiny and justified by a compelling state interest. The County failed to meet that heavy burden and on that basis alone the statute must fall.[10]

Further, even assuming that § 1031(a) serves a compelling state interest, it is plainly unconstitutional because it is neither narrowly drawn nor precise in its application. Like the statute in *Sugarman, supra,* § 1031(a) reaches from positions which have limited responsibilities, *e.g.,* sextons and superintendents of cemeteries, to positions which have greater responsibilities and functions, *e.g.,* sheriff and undersheriffs. *See* Jurisdictional Statement, Appendix A, at 37-42. This indiscriminate sweep of § 1031(a) is no different from the blanket exclusion condemned by this Court in *Sugarman, supra,* and compelled the District Court's conclusion that it is patently unconstitutional.[11] *See also Hampton, et al. v. Mow Sun Wong, et al.,* 426 U.S. 88 (1976).

913 (S.D. N.Y. 1976) (three-judge court), where the exclusion of aliens from teaching positions was also held invalid. In both cases the courts subjected the discriminatory classification to strict judicial scrutiny.

[10]The County's only argument offered to justify § 1031(a)'s discriminatory classification was that § 1031(a) constitutes a valid exercise of the State's power to define its political community.

[11]In *Foley v. Connelie,* 419 F.Supp. 1976 (S.D. N.Y. 1976), prob. juris. noted ..... U.S. ....., 45 U.S.L.W. 3647 (March 29, 1977), New York State's statutory exclusion of aliens from the New York State Police was upheld as a proper exercise of the State's power to define its "political community." Plaintiffs concur in the well reasoned dissenting opinion of Justice Mansfield. Yet, even assuming that *Foley* were correctly decided, it provides little support for the County's argument; § 1031(a)'s discriminatory sweep is quite different from the narrowly drawn

(This footnote is continued on next page)

II

Municipalities Are Not Immune From Suit for Discrimination Which Is Prohibited by 42 U.S.C. § 1981.

It is well established that municipalities are not persons within the meaning of 42 U.S.C. § 1983,[12] and, therefore, are immune from liability for violation of § 1983. *Monroe v. Pape,* 365 U.S. 167 (1961). The County argues that this limitation on liability under § 1983 also applies with full force and effect to actions based on § 1981.[13] Jurisdictional Statement, at 14-15. However, the courts have made it abundantly clear that there are significant differences between § 1981 and § 1983. As the Ninth Circuit in *Bowers v. Campbell,* 505 F.2d 1155 (9th Cir. 1974) explained:

> "Section 1981, like section 1982,[14] is based on the Thirteenth Amendment and the Civil Rights

statute involved in *Foley* and § 1031(a) is clearly inconsistent with the standards set forth in *Sugarman, supra,* 413 U.S., at 643.

[12]Section 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[13]Section 1981 provides in relevant part:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, ..."

[14]Section 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

Act of 1866. [Citations omitted.] Both sections on their face prohibit all racial discrimination regardless of *source*, in contrast to 42 U.S.C. § 1983, based on the Fourteenth Amendment which 'deals only with those deprivations of rights that are accomplished under the color of the law "of any State or Territory" '." *Id.*, at 1158 (emphasis added).

Further, this Court's analysis of § 1982, a companion statute to § 1981, in *District of Columbia v. Carter, supra,* leaves no doubt that the immunity granted to municipalities under § 1983 is inapplicable to actions based on § 1981:

> "[L]ike the Amendment upon which it is based, § 1982 is not a mere prohibition of state laws establishing and upholding racial discrimination in the sale and rental of property, but *rather [is], an 'absolute' bar to all such discrimination, private as well as public, federal as well as state.*" 409 U.S., at 422 (emphasis added).

To the extent that the County suggests that lawful resident aliens are not within the class of persons protected by § 1981, Jurisdictional Statement, at 14, it appears to have overlooked this Court's decision in *Graham v. Richardson, supra,* which explicitly held to the contrary. *See also, Takahashi v. Fish & Game Comm'n., supra,* 334 at 419 n. 7; *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974). Moreover, this Court in *Johnson v. Railway Express Agency, Inc., supra,* firmly held that the right to be free from illegal discrimination in employment is encompassed within the right "to make and enforce contracts" protected by § 1981.

Thus, the District Court's determination that plaintiffs are protected by § 1981 and that the County is not immune from suit for violation of § 1981 was consistent with prior decisions of this Court.

III

Municipalities May Be Sued for Damages Directly Under the Fourteenth Amendment With Jurisdiction Based on 28 U.S.C. § 1331.

This Court in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971) firmly established that the Constitution itself gives a person deprived of his constitutionally guaranteed right a cause of action to redress that deprivation, without regard to any statutorily created cause of action such as § 1981 and § 1983. Such a cause of action "arises under the Constitution . . . of the United States", 28 U.S.C. § 1331, and is cognizable in federal court when more than $10,000 is in controversy. Although *Bivens* involved deprivation of Fourth Amendment rights, this Court and numerous lower courts have recognized that a cause of action for damages and equitable relief is available under the Fourteenth Amendment for deprivation of equal protection of the laws. *See City of Kenosha v. Bruno, supra,* 412 U.S., at 514; *Gray v. Union Co. Intermediate Education District,* 520 F.2d 803 (9th Cir. 1975); *United Farmworkers of Florida v. City of Delray Beach,* 493 F.2d 799 (5th Cir. 1974).

In the instant case, the $10,000 jurisdictional amount was satisfied. In a joint stipulation of facts filed with the District Court, the parties hereto stipulated that the position of deputy probation officer paid more than $10,000 per year. And, as this Court stated

in *Glenwood Light & Water Company v. Mutual Light, Heat & Power Co.*, 239 U.S. 121 (1915). ". . . the jurisdictional amount is to be tested by the value of the object to be gained by the Complaint." *Id.*, at 121. Thus, it is clear that because the $10,000 jurisdictional amount was satisfied in this suit, a cause of action was stated against the county of Los Angeles directly under the Fourteenth Amendment for deprivation of plaintiffs' constitutional right to equal protection of the laws.

The County, however, argues that in enacting § 1983 and its jurisdictional complement, 28 U.S.C. § 1343(3), Congress limited the authority of the federal courts to enforce constitutional rights. Therefore, argues the County, § 1331's grant of general jurisdiction to the federal courts to adjudicate claims which arise under the Constitution and laws of the United States is limited by the parameters of §§ 1983 and 1343(3). Jurisdictional Statement, at 14-15. Yet, as this Court's discussion of § 1331 in *Bell v. Hood*, 327 U.S. 678 (1946) and § 1983 in *Monroe v. Pape, supra*, indicate, § 1331, and § 1983 and § 1343(3) were enacted not only at different times but for different purposes; one does not limit the rights and remedies created by the other. *Lynch v. Household Finance Corporation*, 405 U.S. 538, 546-552 (1972). Clearly, the County's argument is without merit and the Opinion and Judgment of the Court below in this action were consistent with prior decisions of this Court.

Conclusion.

For the above reasons plaintiffs submit that the County's Jurisdictional Statement does not present any issue worthy of plenary consideration by this Court. Therefore, plaintiffs urge this Court to summarily affirm the Partial Judgment of the District Court.

Dated this 15th day of June, 1977 at Los Angeles, California.

Respectfully submitted,

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APPENDIX A.

Government Code § 1031. Public Officers or Employees Having Powers of Peace Officers; Minimum Standards.

Each class of public officers or employees declared by law to be peace officers shall meet at least the following minimum standards:

(a) Be a citizen of the United States;

(b) Be at least 18 years of age;

(c) Be fingerprinted for purposes of search of local, state, and national fingerprint files to disclose any criminal record;

(d) Be of good moral character, as determined by a thorough background investigation;

(e) Be a high school graduate or pass the general education development test indicating high school graduation level; provided that this subdivision shall not apply to any public officer or employee who was employed, prior to the effective date of the amendment of this section made at the 1971 Regular Session of the Legislature, in any position declared by law prior to the effective date of such amendment to be peace officer positions;

(f) Be found, after examination by a licensed physician and surgeon, to be free from any physical, emotional, or mental condition which might adversely affect his exercise of the powers of a peace officer.

This section shall not be construed to preclude the adoption of additional or higher standards, including age.

APPENDIX B.

Penal Code § 830. Peace Officers; Persons Included and Excluded.

Any person who comes within the provisions of this chapter and who otherwise meets all standards imposed by law on a peace officer is a peace officer, and notwithstanding any other provision of law, no person other than those designated in this chapter is a peace officer. The restriction of peace officer functions of any public officer or employee shall not affect his status for purposes of retirement.